NTSB Order No.
EM-67

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 17th day of February 1978.

OWEN W. SILER, Commandant, United States Coast Guard,

v.

EDWIN SYBLAK, Appellant.

Docket ME-64

OPINION AND ORDER

Appellant seeks reversal of the Commandant's decision affirming a 12-month suspension of his license (No. 443693) and merchant mariner's document (No. Z-815975-D2) for misconduct aboard ship.[1] The case arose after appellant had served as a third mate aboard the SS TRENTON on a voyage from Elizabeth, New Jersey, to San Juan, Puerto Rico.

In prior proceedings, a hearing was held before Administrative Law Judge Thomas L. Mackin, who thereafter issued the initial decision which was appealed to the Commandant (Appeal No. 2083).[2] Although represented by counsel on appeal, appellant did not appear either in person or through counsel at the hearing.

The law judge found specifications proved that on January 20, 1975, when the vessel was underway, appellant wrongfully failed to perform his duties by reason of being under the influence of liquor, and by leaving his assigned station at the engine order telegraph. He further found that appellant had received adequate notice of the hearing held in San Juan on February 5, 1975, and therefore concluded that it should proceed in his absence under

[1] The Commandant's decision is subject to review on appeal to this Board under 49 U.S.C. 1903(a)(9)(B).

[2] Copies of the decisions of the Commandant and the law judge are attached.

authority of 46 CFR 5.20-25.[3] In assessing sanction, the law judge classified the offenses as serious since they had occurred "when the vessel was being navigated in close waters...," heading out to sea from Newark Bay on the first night of the voyage (I.D. 5). Appellant was also held to the highest standard of behavior while serving as a licensed officer aboard ship (Id). Finally, his past record of three lesser sanctions for similar offenses in 1951, 1959, and 1965 was considered by the law judge before imposing the 12-month suspension order in this instance.

In his brief on appeal, appellant contends that there was no justification for holding the hearing in his absence; that the law judge committed reversible error by soliciting irrelevant and prejudicial testimony from the master of the TRENTON; and that the sanction is unreasonable. He further contends that the Commandant's legal conclusions to the contrary are erroneous. Counsel for the Commandant has not submitted a reply brief.

Upon consideration of appellant's brief and the entire record, the Board concludes that his notice of hearing and acts of misconduct were established by reliable, probative, and substantial evidence. The findings and conclusions of the law judge, as affirmed by the Commandant, are adopted as our own. Moreover, we find sufficient grounds for imposition of the sanction herein pursuant to 46 U.S.C. 239(g).

Appellant asserts that he was never notified of the pending charges and hearing. Initially, on January 20, 1975, his offenses were entered in the vessel's official logbook (Exh. 2). The entry was read to him 2 days later during the voyage at sea, at which time his reply was recorded[4] and he received copy of the entry. A copy was also forwarded to the Coast Guard office in San Juan and one of its investigating officers boarded the vessel upon its arrival in Puerto Rico. The officer testified that he advised appellant of the misconduct charge and gave him full particulars relative to the hearing scheduled 12 days later in San Juan, its

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[3]This regulation provides, in pertinent part, as follows:
§5.20-25 Failure of person charged to appear at hearing.
(a) In any case in which the person charged, after being duly served with the original of the notice of the time and place of the hearing and the charge and specifications, fails to appear at the time and place specified for the hearing a notation to that effect shall be made in the record and the hearing may then be conducted `in absentia."'

[4]In replying, appellant stated that he "was not drunk absolutely" and claimed discrimination.

possible consequences, and his rights therein including his right to counsel; to which appellant replied that he would have his lawyers transfer the case to New York (Tr. 6-9). Subsequently, according to this testimony, the officer drafted the "charge sheet" in appellant's presence, calling his attention to the charges as he wrote them down while appellant was looking over his shoulder and denying the charges; and then "after a few minutes... excused himself from the room, saying he would be back to sign the charge sheet..., but instead left ship and disappeared (Tr. 9-10). Upon ascertaining that neither of the Coast Guard offices in San Juan or New York had since heard from the appellant, the law judge proceeded with the hearing as scheduled.

The undisputed facts indicate that appellant was well aware of the offenses attributed to him in the vessel's logbook, and their prompt investigation by the Coast Guard. The logbook entry read to him aboard ship is the source of allegations in the Coast Guard specifications drafted on the date of the vessel's arrival in Puerto Rico. Appellant also admits being questioned by the officer at that time about "the alleged incident which was the subject of the official log book entry..." He does not explain why he suddenly disappeared in the midst of this investigation without knowing its outcome, or account for his subsequent whereabouts. These are, at best, dubious grounds for asserting that the Coast Guard failed to provide notice. Moreover, the testimony of record shows conclusively that appellant was apprised of the charge, its supporting allegations, and the time, date, and place of the hearing prior to his unexplained disappearance. His showing to the contrary consists of bare denials and these alone cannot serve as a sufficient reason for us to impugn the Coast Guard officer's testimony.

Appellant also argues that the testimony should be striken where it was in response to leading questions of the law judge. In the first of two cited instances, the law judge asked whether, as he assumed, appellant was informed of the charge before being advised of his rights (Tr. 7). This was the logical assumption and we therefore believe it may safely be construed as an attempt to stimulate an accurate memory rather than implant a false one.[5] We have no doubt that the law judge was seeking the witness' own recollection. The other challenged question recapitulated testimony already given to the effect that appellant was not physically served solely "because he didn't return...as he agreed to when he left..."(Tr. 10). In our view, such interrogation was

[5]U.S. v. McGovern, 499 F. 2d 1140, 1142 (1 Cir. 1974); 3 Wigmore on Evidence § 770, 784 (Chadbourne rev. 1970); Federal Evidence Rule 614 (b), 28 U.S. Code.

well within the discretion of the law judge.

Appellant's remaining argument is that the charge sheet must "at the very least" be tendered in the presence of the person charged. This was a single page form (CG 2639) and it is highly probable that the officer had finished drafting the summons and complaint thereon before appellant's abrupt leavetaking. In any event, it is obvious to us, as it must have been to appellant, that the formal service of process was imminent. The fact that appellant left ship and disappeared at that point can only be seen as a deliberate evasion of personal service.[6] This act of recalcitrance could hardly relieve him of the duty to respond. Rather, we deem it a waiver of the requirement for personal service.[7] In sum, the evidence of record convinces us that appellant had adequate notice of the hearing and all matters of fact and law asserted therein; and that he made his own election not to appear. We, therefore, find that the hearing was properly conducted in his absence.

With respect to the arguments advanced for reversible error, we find no lack of relevance in the master's testimony that he reprimanded appellant on several other occasions for drinking while in off-duty status, although no action was taken (Tr. 24). Certainly, this was not extraneous where intoxication was alleged as the reason for his failure to perform duties. Further testimony that appellant had a reputation for violence was indeed prejudicial and irrelevant (Tr. 31). However, it was cured by the law judge's ultimate finding that neither [appellant's] previous disciplinary record with the Coast Guard [covering 30 years] nor the offenses found proved at the ...hearing show him to be such a violent or dangerous person" (I.D. 5). The prejudicial effect of this testimony was also excluded in the law judge's assessment of sanction. Finally, testimony is complained of wherein the master stated his belief that appellant wanted "down deep" to have his license taken away from him (Tr. 32). There is no indication that the law judge or the Commandant accorded any weight to this opinion, and it deserved none. Its mere reception into evidence

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[6] Roth v. W. T. Cowan, Inc., 97 F. Supp. 675 (E.D. N. Y. 1951); Errion v. Connell, 236 F. 2d 447, 457 (9 Cir. 1956); and Haney v. Olin Corp., 245 So. 2d 671 (Fla. Dist. Ct. App. 1971).

[7] Appellant was specifically advised that the hearing would be conducted in his absence if he failed to appear and that his request for a change of venue should be made to the law judge (Tr. 8).

was not error.[8]

Apart from these objections, the master gave direct testimony on the merits, which is corroborated by the log entry, establishing that appellant was inebriated, that he was not performing his assigned duties at the engine order telegraph, and that he had to be relieved of his watch for these reasons at a time when the vessel was transiting "a very treacherous area" at night (Tr. 18, 34). The master's testimony also established that the vessel's safe navigation depended significantly on the correct transmission of engine orders, which was appellant's assignment. In this situation, the argument that the Coast Guard's scale of average orders should govern our assessment of sanction is unfounded.[9] The offenses in this case were far more serious than the average seaman's offense involving a failure to perform duties. We believe that the sanction imposed here corresponds to the safety risks for the vessel attending a licensed officer's unfitness, due to inebriation, to carry out assigned duties vital to safe navigation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The orders of the Commandant and the law judge suspending appellant's license and document for 12 months be and they hereby are affirmed.

BAILEY, Acting Chairman, McADAMS, HOGUE, and KING, Members of the Board, concurred in the above opinion and order.

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[8] 5 U.S.C. 556 (d); 2 Davis, Administrative Law Treatise, §§ 14.08, 14.17; O'Kon v. Roland, 247 F. Supp. 743, 750 (S. D. N. Y. 1968).

[9] 46 CFR 5.20-165.